

1 and past relevant work experience as a teacher. [AR 273.] Plaintiff
2 alleges disability due to asthma, back and shoulder pain, joint pain,
3 and mood disorders and depression.

4 **II. PROCEEDINGS IN THIS COURT**

5 On October 19, 2011, the parties filed their Joint Stipulation
6 ("JS") identifying matters not in dispute, issues in dispute, the
7 positions of the parties, and the relief sought by each party. This
8 matter has been taken under submission without oral argument.

9 **III. PRIOR PROCEEDINGS**

10 Plaintiff applied for SSI benefits under Title XVI of the Social
11 Security Act in 2005, alleging disability since November 23, 2002.
12 [AR 267.] After initial review and a hearing, her application was
13 denied. [AR 7-13.] When that decision became final, Plaintiff sought
14 review in this court in case number CV07-1450-CW. The matter was
15 ultimately remanded for further administrative proceedings. [See AR
16 285-93.]

17 A second hearing was held on April 9, 2009. [AR 672-93.] On July
18 1, 2009, the Administrative Law Judge ("ALJ") issued a second
19 unfavorable decision. [AR 278-84.] The Appeals Council granted
20 Plaintiff's request for review and again remanded the case to the ALJ.
21 [AR 309-311.] A third hearing was held on May 18, 2010, before a
22 different ALJ. [AR 694-99.] The ALJ held a supplemental (fourth)
23 hearing on July 27, 2010. [AR 700-22.] The ALJ then held another
24 supplemental (fifth) hearing on October 20, 2010. [AR 723-35.] On
25 December 23, 2010, the ALJ issued an unfavorable decision. [AR 264-
26 75.] When the Appeals Council denied review the ALJ's decision became
27 the Commissioner's final decision. These proceedings followed.

IV. STANDARD OF REVIEW

Under 42 U.S.C. § 405(g), a district court may review the Commissioner's decision to deny benefits. The Commissioner's (or ALJ's) findings and decision should be upheld if they are free of legal error and supported by substantial evidence. However, if the court determines that a finding is based on legal error or is not supported by substantial evidence in the record, the court may reject the finding and set aside the decision to deny benefits. See Aukland v. Massanari, 257 F.3d 1033, 1035 (9th Cir. 2001); Tonapetyan v. Halter, 242 F.3d 1144, 1147 (9th Cir. 2001); Osenbrock v. Apfel, 240 F.3d 1157, 1162 (9th Cir. 2001); Tackett v. Apfel, 180 F.3d 1094, 1097 (9th Cir. 1999); Reddick v. Chater, 157 F.3d 715, 720 (9th Cir. 1998); Smolen v. Chater, 80 F.3d 1273, 1279 (9th Cir. 1996); Moncada v. Chater, 60 F.3d 521, 523 (9th Cir. 1995)(per curiam).

"Substantial evidence is more than a scintilla, but less than a preponderance." Reddick, 157 F.3d at 720. It is "relevant evidence which a reasonable person might accept as adequate to support a conclusion." Id. To determine whether substantial evidence supports a finding, a court must review the administrative record as a whole, "weighing both the evidence that supports and the evidence that detracts from the Commissioner's conclusion." Id. "If the evidence can reasonably support either affirming or reversing," the reviewing court "may not substitute its judgment" for that of the Commissioner. Reddick, 157 F.3d at 720-721; see also Osenbrock, 240 F.3d at 1162.

V. DISCUSSION

A. THE FIVE-STEP EVALUATION

To be eligible for disability benefits a claimant must demonstrate a medically determinable impairment which prevents the

1 claimant from engaging in substantial gainful activity and which is
2 expected to result in death or to last for a continuous period of at
3 least twelve months. Tackett, 180 F.3d at 1098; Reddick, 157 F.3d at
4 721; 42 U.S.C. § 423(d)(1)(A).

5 Disability claims are evaluated using a five-step test:

6 Step one: Is the claimant engaging in substantial
7 gainful activity? If so, the claimant is found not
8 disabled. If not, proceed to step two.

9 Step two: Does the claimant have a "severe" impairment?
10 If so, proceed to step three. If not, then a finding of not
11 disabled is appropriate.

12 Step three: Does the claimant's impairment or
13 combination of impairments meet or equal an impairment
14 listed in 20 C.F.R., Part 404, Subpart P, Appendix 1? If
15 so, the claimant is automatically determined disabled. If
16 not, proceed to step four.

17 Step four: Is the claimant capable of performing his
18 past work? If so, the claimant is not disabled. If not,
19 proceed to step five.

20 Step five: Does the claimant have the residual
21 functional capacity to perform any other work? If so, the
22 claimant is not disabled. If not, the claimant is disabled.

23 Lester v. Chater, 81 F.3d 821, 828 n.5 (9th Cir. 1995, as amended
24 April 9, 1996); see also Bowen v. Yuckert, 482 U.S. 137, 140-142, 107
25 S. Ct. 2287, 96 L. Ed. 2d 119 (1987); Tackett, 180 F.3d at 1098-99; 20
26 C.F.R. § 404.1520, § 416.920. If a claimant is found "disabled" or
27 "not disabled" at any step, there is no need to complete further
28 steps. Tackett, 180 F.3d 1098; 20 C.F.R. § 404.1520.

1 Claimants have the burden of proof at steps one through four,
 2 subject to the presumption that Social Security hearings are non-
 3 adversarial, and to the Commissioner's affirmative duty to assist
 4 claimants in fully developing the record even if they are represented
 5 by counsel. Tackett, 180 F.3d at 1098 and n.3; Smolen, 80 F.3d at
 6 1288. If this burden is met, a prima facie case of disability is
 7 made, and the burden shifts to the Commissioner (at step five) to
 8 prove that, considering residual functional capacity ("RFC")¹, age,
 9 education, and work experience, a claimant can perform other work
 10 which is available in significant numbers. Tackett, 180 F.3d at 1098,
 11 1100; Reddick, 157 F.3d at 721; 20 C.F.R. § 404.1520, § 416.920.

12 **B. THE ALJ'S EVALUATION IN PLAINTIFF'S CASE**

13 In the relevant hearing decision, the ALJ found Plaintiff had not
 14 engaged in substantial gainful activity since April 21, 2005, the
 15 application date (step one); that Plaintiff had "severe" impairments
 16 of major depressive disorder, personality disorder, degenerative
 17 arthritis involving the spine and right shoulder, and cervical
 18 radiculopathy (step two); and that Plaintiff did not have an
 19 impairment or combination of impairments that met or equaled a
 20 "listing" (step three). [AR 269.]

21 The ALJ found that Plaintiff had the following RFC:

22 [T]o perform medicum work as defined in 20 CFR 416.967(c)

23
 24 ¹ Residual functional capacity measures what a claimant can
 25 still do despite existing "exertional" (strength-related) and
 26 "nonexertional" limitations. Cooper v. Sullivan, 880 F.2d 1152, 1155
 27 n.s. 5-6 (9th Cir. 1989). Nonexertional limitations limit ability to
 28 work without directly limiting strength, and include mental, sensory,
 postural, manipulative, and environmental limitations. Penny v.
Sullivan, 2 F.3d 953, 958 (9th Cir. 1993); Cooper, 800 F.2d at 1155
 n.7; 20 C.F.R. § 404.1569a(c). Pain may be either an exertional or a
 nonexertional limitation. Penny, 2 F.3d at 959; Perminster v. Heckler,
 765 F.2d 870, 872 (9th Cir. 1985); 20 C.F.R. § 404.1569a(c).

1 except that [Plaintiff] can stand, walk and/or sit no more
2 than six hours out of eight with normal breaks such as every
3 two hours, lift and/or carry no more than 40 pounds
4 occasionally and 20 pounds frequently and can no more than
5 occasionally stoop and bend. She is limited to no more than
6 occasional work above shoulder level on the right and is
7 without limitation on the left. The [Plaintiff] can climb
8 stairs but not ladders, work at heights or balance and her
9 work environment should be air-conditioned and free of
10 excessive inhaled pollutants such as an office or this
11 hearing room. Mentally the [Plaintiff] is limited to simple
12 repetitive work requiring no interaction with the general
13 public, hypervigilance or fast paced type work.

14 [AR 271.] He then found Plaintiff is not capable of performing her
15 past relevant work as a kindergarten teacher (step four). [AR 273.]
16 Considering Plaintiff's age, education, work experience, RFC and work
17 skills acquired from past relevant work, the ALJ found that Plaintiff
18 could perform other work existing in significant numbers in the
19 national economy (step five). [AR 274.] Accordingly, Plaintiff was
20 found not "disabled" as defined by the Social Security Act. [Id.]

21 **C. ISSUES IN DISPUTE**

22 The Joint Stipulation identifies as disputed issues whether:

- 23 1. The ALJ complied with the order of the Appeals Council
24 requiring the ALJ to properly consider Plaintiff's
25 subjective complaints; and
- 26 2. The hearing decision is inconsistent with the Dictionary of
27 Occupational Titles ("DICTOT") in that the ALJ found
28 Plaintiff can perform the job of Hand Packager.

1 [Joint Stipulation "JS" 3.]

2 **D. ISSUE ONE: APPEALS COUNCIL REMAND ORDER**

3 The first issue turns on whether the ALJ adequately followed the
4 Appeals Council remand order and considered Plaintiff's subjective
5 symptoms, and, particularly, whether she suffers from adverse side
6 effects from medications. [AR 310.]

7 As an initial matter, while it is correct that the Appeals
8 Council order directed the ALJ to address these issues, by its terms
9 the order did so to comply with this court's instructions on remand.
10 [See AR 309.] However, Plaintiff's prior matter was remanded for
11 further development of the record only with respect to the narrow
12 issue of whether the ALJ adequately evaluated the record with respect
13 to Plaintiff's depression, and not with respect to Plaintiff's
14 subjective complaints or side effects. [See AR 285-93.]

15 In any event, the ALJ adequately addressed Plaintiff's subjective
16 complaints and any alleged side effects. First, after laying out and
17 assessing the medical evidence that relates to Plaintiff's subjective
18 complaints, the ALJ directly summarized and discounted her testimony
19 and complaints as follows:

20 [Plaintiff] was not a fully credible witness. [She] testified
21 that she was currently undergoing psychiatric treatment for
22 depression and is prescribed Wellbutrin, Celexa and Amblify. She
23 said that she sees her therapist once a month which "helps." Her
24 testimony over several hearings has ranged from complaints of
25 shortness of breath, asthma, pneumonia, chronic back and joint
26 pain, chronic fatigue and depression over her physical condition.
27 There have been no specific findings of an orthopedic impairment
28 or limitations imposed despite her allegations of back and joint

1 pain. She testified that her back pain did not bother her in
2 April 2005 and that her neck and back pain started only three
3 months ago. From late 2005, she estimated that she could sit one
4 hour, stand a little less than 45 minutes and lift a maximum of
5 20 pounds. The medical records show normal pulmonary function
6 tests and chest x-rays and despite her testimony that she has had
7 asthma for 20 years has only seen a physician for this problem
8 since April 2005. [Plaintiff] has conceded that she applied for
9 disability due to a physical not a mental impairment. She
10 voluntarily left work in June 2005 when she was working for a
11 friend labeling gemstones and despite not really describing any
12 significant daily activities there is no impairment credibly
13 established in the record which would significantly limit her
14 daily activities.

15 [AR 273.]

16 Plaintiff does not persuasively point to any subjective statement
17 or limitation that the ALJ ignored in this discussion, or that would
18 alter the finding of nondisability in this case. In particular,
19 notwithstanding Plaintiff's allegations here, the ALJ explicitly
20 discussed Plaintiff's subjective evaluation of her own ability to sit,
21 stand, and lift and rejected her assessment based on his findings that
22 (1) her statements were inconsistent with the medical record as a
23 whole; (2) that she was not credible overall; and (3) the medical
24 evidence established lesser limitations than those to which she
25 testified. [See AR 269-73.] Because these findings were specific and
26 based upon substantial record evidence, the law does not require more.
27 See Burch v. Barnhart, 400 F.3d 676, 681 (9th Cir. 2005) ("The ALJ must
28 specify what testimony is not credible and identify the evidence that

1 undermines the claimant's complaints. . . ."); Tommasetti v. Astrue,
2 533 F.3d 1035, 1039 (9th Cir. 2008)(the ALJ is required to "make a
3 credibility determination with findings sufficiently specific to
4 permit the court to conclude that the ALJ did not arbitrarily
5 discredit the claimant's testimony.")

6 To the extent Plaintiff contends the ALJ should have addressed
7 the side effects of her medications, for the most part the record
8 reflects that Plaintiff reported no side effects to her physicians and
9 that, to the extent she did, her complaints were of mild and sporadic
10 problems that would not have impacted her RFC. [See AR 672-735, 636,
11 644.] Howard v. Barnhart, 341 F.3d 1006, 1012 (9th Cir. 2003)(while
12 the ALJ must consider the "combined effect" of the claimant's
13 impairments, the ALJ need not "discuss every piece of
14 evidence." (citing Vincent v. Heckler, 739 F.2d 1393, 1394-95 (9th Cir.
15 1984))); Vincent, 739 F.3d at 1394 (The ALJ is required only to
16 explain why evidence that is significant and probative of a disability
17 has been rejected). Indeed, the only alleged report of a side-effect
18 Plaintiff points to in her portion of the joint stipulation [see JS at
19 7] was an ambiguous reference in Plaintiff's testimony before the ALJ,
20 i.e., that additional medication had been recently added because she
21 was sleeping a lot and because it would help her with her mood. [AR
22 706.] While this testimony could conceivably support the inference
23 that Plaintiff's sleepiness was a side-effect of her current
24 medication, it could equally support the inference that the sleepiness
25 was a symptom of Plaintiff's long-standing complaints of chronic
26 fatigue and depression. Where the evidence is thus susceptible of
27 more than one rational interpretation, it is the Commissioner's
28 conclusion which must be upheld. Key v. Heckler, 754 F.2d 1545, 1549

1 (9th Cir. 1985).

2 For all these reasons, any error here would be harmless. Stout
3 v. Commissioner of Soc. Security Admin., 454 F.3d 1050, 1056 (9th Cir.
4 2006)(holding that an error may be harmless when it is inconsequential
5 to the ultimate nondisability determination)(citing, inter alia,
6 Matthews v. Shalala, 10 F.3d 678, 681 (9th Cir. 1993)(as concluding
7 that an error was harmless that occurred during hypothetical the ALJ
8 was "not required" to ask)). Remand is not warranted with respect to
9 this issue.

10 **E. ISSUE TWO: DICOT**

11 In issue two, Plaintiff contends the decision is in error because
12 she is unable to perform the job of hand packager, DICOT 920.587-018,
13 which was proposed by the Vocational Expert ("VE") and adopted by the
14 ALJ at step five of the hearing decision. [See AR 274-75, 732-33.]
15 Although Plaintiff is incorrect to suggest that this job exceeds her
16 ability to lift and carry, in that the VE eroded the numbers to
17 account for her limitations in that regard [AR 732-33], reversal is
18 nonetheless warranted because other requirements of this job, and the
19 alternate job opined by the VE but not addressed in the decision,
20 facially exceed Plaintiff's capacities.

21 Defendant does not dispute that by its terms the DICOT definition
22 of the hand packager job exceeds Plaintiff's RFC. [JS at 18.]
23 Specifically, for example, the job requires Plaintiff to balance
24 occasionally and calls for frequent exposure to extreme heat, see
25 DICOT 920.587-018, 1991 WL 687916, whereas Plaintiff's RFC precludes
26 her from both [AR 272, 732].

27 Defendant contends, however, that the error is harmless because
28 the VE also opined that Plaintiff could perform work as a hospital

1 cleaner [AR 733], DICOT 323.687-010, 1991 WL 672782, which job exists
2 in significant numbers even when eroded to account for Plaintiff's
3 inability to engage in the full range of medium work. [See AR 733.]
4 This argument is unpersuasive. The requirements for the hospital
5 cleaner job likewise exceed Plaintiff's RFC. Specifically, for
6 example, a hospital cleaner is required to stoop frequently, DICOT
7 323.687-010, 1991 WL 672782, whereas Plaintiff retains the ability to
8 stoop only occasionally [AR 271].

9 When, as here, the opinion of the VE deviates from or conflicts
10 with the DICOT definitions, the ALJ may adopt the VE's testimony only
11 if the record contains "'persuasive evidence to support the
12 deviation.'" Pinto v. Massanari, 249 F.3d 840, 846 (9th Cir.
13 2001)(quoting Johnson v. Shalala, 60 F.3d 1428, 1435 (9th Cir.
14 1995)(additional citations omitted)). Because the ALJ failed to
15 address this discrepancy, it is unclear whether there is persuasive
16 evidence supporting the VE's deviation from the DICOT and, therefore,
17 whether there remain jobs in significant numbers that Plaintiff could
18 perform. Consequently, reversal is warranted to further develop the
19 record in this limited respect.

20 **F. REMAND FOR FURTHER PROCEEDINGS**

21 The decision whether to remand for further proceedings is within
22 the discretion of the district court. Harman v. Apfel, 211 F.3d 1172,
23 1175-1178 (9th Cir. 2000). Where no useful purpose would be served by
24 further proceedings, or where the record has been fully developed, it
25 is appropriate to exercise this discretion to direct an immediate
26 award of benefits. Harman, 211 F.3d at 1179 (decision whether to
27 remand for further proceedings turns upon their likely utility).
28 However, where there are outstanding issues that must be resolved

1 before a determination can be made, and it is not clear from the
2 record that the ALJ would be required to find the claimant disabled if
3 all the evidence were properly evaluated, remand is appropriate. Id.

4 Here, the ALJ erred in failing to discuss the apparent deviation
5 between the VE's testimony and the DICOT and whether significant
6 numbers of jobs exist that Plaintiff can perform notwithstanding that
7 deviation. Thus, outstanding issues remain before a determination can
8 be made, and remand for further administrative proceedings is
9 appropriate. See e.g., Strauss v. Comm'r of Soc. Sec. Admin., 635
10 F.3d 1135, 1136 (9th Cir. 2011) (remand for automatic payment of
11 benefits inappropriate unless evidence unequivocally establishes
12 disability).

13 **VI. ORDERS**

14 Accordingly, **IT IS ORDERED** that:

15 1. The decision of the Commissioner is **REVERSED**.

16 2. This action is **REMANDED** to defendant, pursuant to Sentence
17 Four of 42 U.S.C. §405(g), for further administrative proceedings
18 consistent with instructions set forth in the body of the decision.

19 3. The Clerk of the Court shall serve this Decision and Order
20 and the Judgment herein on all parties or counsel.

21
22 DATED: January 3, 2012

23 

24 CARLA M. WOHRLE
25 United States Magistrate Judge
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